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CHASET V. FLEER/SKYBOX INTERNATIONAL, LP:
SWAPPING TRADING CARDS FOR TREBLE DAMAGES—
CAN INDIVIDUALS REALLY SUE TRADING CARD
COMPANIES UNDER THE RICO ACT?

I. TRADING CARDS MAY NOT BE CHILD'S PLAY ANYMORE

Suppose an individual enters an establishment, deposits money, pulls a lever, and excitedly stares: Flip, flip, flip . . . JACKPOT! This description may conjure up images of slot machines in a Las Vegas casino, while it also illustrates what some children do at their local trading card shops.¹

Although companies have manufactured and distributed trading cards since the nineteenth century, people recently criticized their marketing practices for inducing gambling.² For about a decade, trading card companies actively have promoted and advertised the insertion of "chase cards" into trading card packs.³ Because

1. See James Halperin, *Kids, Gimmicks, and Coin Collecting*, at <http://www.stantonbooks.com/articles/index17.html> (last visited Mar. 9, 2003) (providing example of child's behavior at local trading card store). The author provided a real-life example:

A friend who operates a coin and trading card shop told me about a young boy who used a twenty-dollar bill to purchase five packs of premium trading cards. Instead of leaving the store with his purchase, the customer deftly tore open the packages and scanned the cards. Finding nothing of interest, he shrugged as he tossed the lot in a nearby wastebasket! Is there much difference between what this child did and plunking down chips at a gambling casino?

Id. The term "trading card" as opposed to "baseball card" is used throughout this Note because the cases and issues discussed involve various sports trading cards and other non-sports-related cards, like *Pokémon* cards. See, e.g., *Chaset v. Fleer/Skybox Int'l, LP*, 300 F.3d 1083, 1086 n.1 (9th Cir. 2002) (explaining difference between *Pokémon* and other types of trading cards).

2. See Chris Stuffletstreet, *A Somewhat Thorough History of Baseball Cards (1876-1980)*, at <http://www.geocities.com/chrisstuffletstreet/history.html> (last visited Mar. 9, 2003). "The first major, nationally distributed set of cards was issued beginning in 1887 by Goodwin & Co. of New York City." *Id.*; see also Anthony N. Cabot, *Say It Ain't So*, at http://www.lionelsawyer.com/say_it_aint.htm (last visited Mar. 9, 2003) (discussing gambling elements evident in trading card industry).

3. See *Lawyers Dispute Whether 'Chase' Trading Cards Involve Children in Gambling, Amount to Racketeering*, METROPOLITAN NEWS-ENTERPRISE, Dec. 6, 2001, at 1 (covering concept and history of "chase cards"), available at <http://www.metnews.com/articles/duma120601.htm>. The article contends "chase card marketing became popular about eight years ago" and the rare cards "depict highly popular players or game pieces and are printed in limited quantities and randomly inserted in sealed packages. . . . The odds of obtaining the special cards—or 'insertion rates' as the industry prefers to call them—are routinely advertised on the packages and in promotional literature." *Id.*

there is an active secondary market for trading cards, where individuals can sell and trade rare “chase cards,” traders create an “artificially high demand” for the cards.⁴ Individuals allege this demand, the intentional insertion of rare cards in the packages and the advertisement of the odds of finding such cards, constitutes illegal gambling.⁵ This sudden concern and criticism may have resulted from the popularity of *Pokémon* trading cards, which are primarily marketed to children.⁶

Even though adults also trade cards and their activities sustain the same alleged illegal consequences, anti-trading card activists are more concerned with the hazards the hobby poses to children.⁷ If the illegality of the alleged gambling is not enough, parents and educators, in an attempt to discourage the hobby, outline its additional damaging effects.⁸ Parents fear their children may become

4. See Mike O’Connell, *Can Your [sic] Really Sue Pikachu?*, at <http://www.anotheruniverse.com/tv/Pokemon/Pokemon100899.html> (last visited Sep. 15, 2002) (on file with author); see also Steven Kent, *Welcome to the Pokemon Casino: Will the Craze for Collecting Turn Kids into Gamblers?*, at <http://www.sidewalksunday.school.com/documents/pkemon.pdf> (last visited Mar. 10, 2003) (noting creation of secondary market). “Those huge payoffs [for trading cards] are a free-market phenomenon created by collectors independent of the manufacturers. Nintendo has not offered to buy back [rare] cards for \$70, nor does it print a catalog suggesting an amount for how much those cards are worth.” *Id.*

5. See generally Cabot, *supra* note 2 (insisting insertion of special cards into random trading card packs constitutes illegal gambling); *Consumers Say Pokemon Cards Constitute Illegal Gambling Enterprise*, 11 ANDREWS SPORTS & ENT. REP. 10, 10 (2000) [hereinafter *Consumers*] (“[P]arents claim . . . kids are encouraged to keep buying [*Pokémon* cards] in the hope of acquiring the valuable ones [and] equate this activity to a lottery . . .”). For a discussion of the elements of illegal gambling, see *infra* notes 83-108 and accompanying text.

6. See Kent, *supra* note 4 (“[*Pokémon* cards are] the most popular trading cards on the market today.”); see also Chaset, 300 F.3d at 1086 n.1 (discussing plaintiff who sued *Pokémon* card manufacturers alleging cards “are used in a card game” and people buy them “both for the chance to obtain more valuable cards and to play the game”). For a general discussion of the objectives and rules of the *Pokémon* trading card game, see *Basic Rules*, at <http://www.wizards.com/default.asp?x=pokemon/rules/welcome> (last visited Mar. 10, 2003).

7. See Kent, *supra* note 4 (explaining how children resemble adult gamblers). “[W]hen the kids buy the cards, they act just like a gambler in a casino—they act nervously, they perspire, when they open the pack of cards they squeeze them like a poker player trying to squeeze a flush, and worst of all, they can’t stop.” *Id.*; see also Chaset, 300 F.3d at 1083 (listing most plaintiffs against trading card companies as “guardian ad litem” for minors); Sheri Wallace, *Pokémon: Is It Right for Your Family?*, at <http://www.sheriwallace.com/pokemon.htm> (last visited Mar. 10, 2003) (noting child psychologist’s opinion on effects of card trading). Wallace quotes a child psychologist: “Although [card trading] seems innocuous, it can lead to some problems such as long term gambling. I have decided not to allow the cards and games in my house.” *Id.*

8. See Kyle Parks, *Marketing Monster*, ST. PETERSBURG TIMES, Oct. 24, 1999, at 1H (mentioning schools where card trading is banned), available at http://www.sptimes.com/News/102499/Business/Marketing_monster.shtml; see also *Hooked on*

addicted to card collecting and trading.⁹ School officials fear the *Pokémon* phenomenon disrupts educational endeavors.¹⁰ Some children even have recognized their own vulnerability to these dangers.¹¹

Concerned groups and individuals have redirected these fears and illustrated the dangerous effects of card collecting and trading in an attempt to vilify the trading card industry.¹² Other factions insist proper nurturing can remedy their children's erratic behavior and suggest parents cannot rightfully blame the trading card industry.¹³ Still, others maintain that the *Pokémon* craze is nothing more than a fad and that parents are partly to blame for its eruption.¹⁴

Pokemon: Is Pokemon Harmless Entertainment or an Addiction?, at http://www.pascrell.com/library/family/1999-12-21_ent-pokemon.shtml (Dec. 21, 1999) [hereinafter *Hooked*] (outlining several different concerns over card trading shared by parents and schools); Kent, *supra* note 4 (conveying parent's account of children's behavior due to card trading); Wallace, *supra* note 7 (indicating school official's concerns over card trading).

9. See *Hooked*, *supra* note 8 (relaying parents' concern for children's behavior). "Some [parents] compare their children's behavior to that of an addict, causing strife between parents and children." *Id.*; see also Kent, *supra* note 4 (discussing father's experience with getting his son to quit trading). After watching his son collect cards for six or eight months, a father "realized something was wrong, it was no longer fun. [His son] was anxious, trying to get these cards that evidently are very rare, very elusive, and they're valuable. And he wasn't getting these cards." *Id.* His son tried to quit "but occasionally he [would] buy another pack, hoping against hope that that [would] be the one that [would] make it all right and cut his losses." *Id.*

10. See Parks, *supra* note 8, at 1H (noting children's behavior at schools and schools' reactions to it). "At most area schools, the cards have been banned because kids wouldn't stop playing with them in class or fighting over them at recess. Still, some kids have been surreptitiously making trades in hallways and cafeterias." *Id.*; see also Wallace, *supra* note 7 (highlighting children's card trading habits in schools). "[T]he trading cards were too disruptive. Students were fighting over the cards and trying to trade during class. . . . They found it difficult to concentrate on schoolwork when they had the cards in their backpacks." *Id.*

11. See, e.g., *Hooked*, *supra* note 8 (noting thirteen-year-old boy admitted *Pokémon* card collecting is "highly addictive").

12. See Ann Lewinson, *Possessed by Pokémon: End-of-the-Millennium Decadence Rears Its Adorably Monstrous Head*, at http://old.valleyadvocate.com/articles/pokemon_vl.html (last visited Mar. 18, 2003) (commenting on problems with children). "It is hardly a stretch to say that today's children are possessed by a demon. That demon is corporate greed, conspiring to perpetuate itself by turning the youngest of minds on to the consumerist impulse, inductuating them while they are young, seducing them with cute little monsters." *Id.*

13. See *Pokemania*, at <http://www.500words.net/pokemania.htm> (last visited Mar. 10, 2003) (criticizing parents for failure to monitor children's habits). Reacting to stories of children spending "thousands of dollars . . . to complete their collection" and mothers complaining "the kids came home asking for hundreds of dollars to purchase single cards," the author suggests old-fashioned parental discipline may be the best remedy. *Id.*

14. See *It's Just Another Fad*, at <http://www.epinions.com/game-review-51E5-3275D53-393303DA-prod5> (May 29, 2000) (suggesting parents' overzealous behav-

Despite some individuals' insistence that "chase card" collecting's damaging effects could be better alleviated without legal action, several parties have attempted to challenge the trading card industry in the courtroom.¹⁵

The case at issue in this Note is *Chaset v. Fleer/Skybox International, LP*.¹⁶ This Note begins with the facts surrounding the case.¹⁷ Then, it summarizes the history and purpose of the Racketeer Influenced and Corrupt Organizations Act (RICO).¹⁸ Next, this Note outlines the procedure for successfully filing a civil RICO claim.¹⁹ With that broad outline, this Note then explores the potential reach of California gambling laws.²⁰ This Note further examines treatment of relevant laws with a discussion of how courts in various jurisdictions have approached RICO claims in the trading card realm.²¹ After discussing the relevant laws, this Note observes and criticizes how the Ninth Circuit approached the issue.²² Finally,

ior heightened expensive holiday-time fads, like *Cabbage Patch* dolls, *Tickle Me Elmo* dolls, *Furby* dolls, and *Beanie Babies*, and children learn from their parents that it is acceptable to pay exorbitant prices for popular toys); see also *Our View*, DAILY NEWS LEADER (Staunton, Va.), Dec. 12, 1999, at 4A:

In examining the excesses that have come to be associated with what should have been innocent children's fads, we can trace the blame directly back to adults[] . . . who are sucker enough to allow themselves to be manipulated, greedy enough to want to cash in on the mania, and incapable of giving their children direction in their lives as parents.

Id.

15. See, e.g., *Chaset v. Fleer/Skybox Int'l, LP*, 300 F.3d 1083, 1086 (9th Cir. 2002) (discussing plaintiffs who sued trading card companies under RICO); *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 604 (5th Cir. 1998) [hereinafter *Price II*] (involving complaint against card manufacturers); *Major League Baseball Props., Inc. v. Price*, 105 F. Supp. 2d 46, 48 (E.D.N.Y. 2000) [hereinafter *MLB Props.*] (exploring trading card purchasers' RICO claim against trading card companies). For a discussion of these cases, see *infra* notes 24-34, 109-39 and accompanying text.

16. 300 F.3d 1083 (9th Cir. 2002).

17. For a discussion of the facts surrounding *Chaset*, see *infra* notes 24-34 and accompanying text.

18. For a history of the RICO statutes, see *infra* notes 35-40 and accompanying text.

19. For a discussion of the elements necessary to form a civil RICO claim, see *infra* notes 41-82 and accompanying text.

20. For a discussion of the California lottery and gambling laws, see *infra* notes 90-108 and accompanying text.

21. See, e.g., *Price II*, 138 F.3d 602, 604-05 (5th Cir. 1998) (describing plaintiffs' claim against card manufacturers); *MLB Props.*, 105 F. Supp. 2d 46, 48 (E.D.N.Y. 2000) (explaining claim against trading card companies). For case law regarding RICO claims against trading card manufacturers, see *infra* notes 109-39 and accompanying text.

22. For an outline and criticism of the Ninth Circuit's analysis in *Chaset*, see *infra* notes 140-78 and accompanying text.

this Note hypothesizes the effects the Ninth Circuit's decision may have on similar RICO claims.²³

II. FACTS OF CHASET V. FLEER/SKYBOX INTERNATIONAL, LP

In *Chaset*, the Ninth Circuit affirmed the dismissal of eight separate but identical claims made by eight similarly situated groups of plaintiffs.²⁴ Each plaintiff group, as purchasers of trading cards, attempted to sue trading card manufacturers under the federal RICO statute.²⁵ The Ninth Circuit considered whether the plaintiffs had standing under 18 U.S.C. § 1964(c) to sue the defendants.²⁶ In the nearly identical district court cases, the plaintiff trading card purchasers "alleged that the random inclusion of limited edition cards in packages of otherwise randomly assorted sports and entertainment trading cards constituted unlawful gambling in violation of RICO."²⁷

The Ninth Circuit noted that limited edition cards "are more rare than base cards and, thus, they generally are more desirable to card collectors."²⁸ The court also recognized that on each card pack or display box, the card manufacturers disclose the odds of finding a "chase card" in an individual package.²⁹ It further acknowledged the existence of a secondary market created by the card collectors and traders.³⁰

23. For propositions of the possible impact of the Ninth Circuit's opinion on this area of law, see *infra* notes 179-95 and accompanying text.

24. See *Chaset v. Fleer/Skybox Int'l, LP*, 300 F.3d 1083, 1085 (9th Cir. 2002) (affirming district court's dismissals).

25. See *id.* (describing plaintiffs' claims); see also 18 U.S.C. §§ 1961-1968 (2000) (outlining basic RICO elements). For a more comprehensive discussion of the RICO statute sections involved in this case, see *infra* notes 41-82 and accompanying text.

26. See *Chaset*, 300 F.3d at 1085-86 (explaining issue of case); see also 18 U.S.C. § 1964(c) (2000) (noting standing to sue). "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit" *Id.* For a discussion of the elements of § 1964(c), see *infra* notes 41-64 and accompanying text. For an outline of the remaining RICO elements, see *infra* notes 65-82 and accompanying text.

27. *Chaset*, 300 F.3d at 1086. For a discussion of what constitutes gambling under RICO, see *infra* notes 83-89 and accompanying text.

28. *Chaset*, 300 F.3d at 1086. For a broad discussion of the history and modern popularity of "chase cards," see *supra* notes 3-15 and accompanying text.

29. See *Chaset*, 300 F.3d at 1086 ("Almost every card manufacturer also includes a disclaimer which states that the advertised odds are an average for the entire production run and are not guaranteed within an individual pack or box.").

30. See *Chaset*, 300 F.3d at 1086 (noting secondary market is "active at trading card conventions, trading card stores, and on the Internet").

The plaintiffs argued these three concessions “constituted gambling, a RICO violation, because the essential elements of gambling—price, chance, and prize—were all present.”³¹ The defendants filed motions to dismiss for failure to state a claim “on the ground that the plaintiffs lacked standing because they had not suffered an injury cognizable under RICO.”³² The district court granted the motions, dismissed the RICO claims, and filed judgments for the defendants.³³ The Ninth Circuit affirmed, commenting, “[p]urchasers of trading cards do not suffer an injury cognizable under RICO when they do not receive an insert card.”³⁴

III. RICO: FROM CRIME PREVENTION TO CIVIL REDEMPTION

A. A Brief History of RICO

In 1970, Congress sought to curb organized crime by enacting the Federal RICO Act.³⁵ It constructed the statute “to prevent criminal organizations from infiltrating legitimate commercial enterprises.”³⁶ Congress specifically aimed to regulate the “racketeering

31. *Id.* (“[T]he purchasers paid at least a portion of the purchase price for the chance to win an insert card.”). For a thorough discussion of the elements of gambling, see *infra* notes 83-108 and accompanying text. For a discussion of the history of RICO, see *infra* notes 35-38 and accompanying text.

32. *Chaset*, 300 F.3d at 1086. To have standing under RICO, a plaintiff must have been “injured in his [or her] business or property by reason of a violation of section 1962 [of U.S.C. chapter 18].” 18 U.S.C. § 1964(c) (2000). For a comprehensive discussion on standing under RICO, see *infra* notes 44-64 and accompanying text. For an outline of all RICO elements, see *infra* notes 41-82 and accompanying text.

33. See *Chaset*, 300 F.3d at 1086. The district court declared that the plaintiffs lacked standing under 18 U.S.C. § 1964(c) because they “struck a bargain with Defendants and received the benefit of their bargain.” *Id.* (quoting *Dumas v. Major League Baseball Props., Inc.*, 104 F. Supp. 2d 1220, 1223 (S.D. Cal. 2000) “[hereinafter *Dumas II*]). The Ninth Circuit did not consider the validity or possibility of the plaintiffs’ state law claims. See *id.* at 1083-88 (neglecting state law claims). For the district court’s discussion of these state law claims, see *infra* notes 128-32 and accompanying text.

34. *Chaset*, 300 F.3d at 1087 (“[D]isappointment upon not finding an insert card in the package is not an injury to property.”).

35. See Donald W. Cassidy, Comment, *Turning RICO on Its Head: Schiffels v. Kemper Financial Services, Inc. and the Need to Limit Standing Under 1962(d) to Plaintiffs Who Allege Injuries from Racketeering Acts*, 78 MINN. L. REV. 467, 470-89 (1993) (providing brief history of RICO).

36. Dana P. Babb, *Recent Development: Asked but Not Answered—Accrual of Private Civil RICO Claims Following Klehr v. A.O. Smith Corp.*, 76 WASH. U. L.Q. 1149, 1150 (1998). The author further noted:

RICO criminalizes three distinct activities. First, . . . using or investing income derived “from a pattern of racketeering activity or through collection of an unlawful debt” to acquire an interest in or establish or operate any enterprise engaged in or affecting interstate commerce. Second, . . . acquiring or maintaining any interest or control of any enterprise en-

activity" it named in the statute.³⁷ Notwithstanding this objective, "RICO also has broad application beyond the organized crime context, since Congress has mandated that RICO 'be liberally construed to effectuate its remedial purposes.'"³⁸

This liberal construction has given individuals an attempt to curtail certain business operations.³⁹ Imagine a child in a local trading card shop: So long as his or her parents can meet the necessary requirements, they can file a RICO suit against trading card companies to allege an illegal gambling scheme.⁴⁰

B. The Basics of Civil RICO Claims

Despite the primary intent of RICO to deter and regulate criminal behavior, individuals may also use the statute for civil relief.⁴¹ A RICO violation "requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity," in addition to proving standing.⁴² A plaintiff has standing if the proscribed conduct "injure[s] [him or her] in his [or her] business or property."⁴³

gaged in or affecting interstate commerce, or conducting or participating in such enterprise through a pattern of racketeering or collection of unlawful debt. Finally, RICO makes a conspiracy to engage in any such conduct illegal.

Id. at 1150-51 (citing 18 U.S.C. § 1962(a)-(d) (1998)). For a complete description of the behavior prohibited by RICO, see 18 U.S.C. § 1962 (2000).

37. See 18 U.S.C. § 1961(1) (2000). The non-exhaustive list of racketeering activities includes "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical . . . which is chargeable under State law and punishable by imprisonment for more than one year[.]" as well as any various other acts "indictable under . . . provisions of Title 18, United States Code." *Id.*

38. Daniel Luccaro et al., *Racketeer Influenced and Corrupt Organizations*, 38 AM. CRIM. L. REV. 1211, 1212-13 (2001) (quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 942 (1970)).

39. See, e.g., *Chaset*, 300 F.3d at 1086 (exemplifying parents' challenges against alleged fraudulent activity of trading card companies); *Price II*, 138 F.3d 602, 604 (5th Cir. 1998) (outlining civil RICO challenge against trading card company); *MLB Props.*, 105 F. Supp. 2d 46, 48 (E.D.N.Y. 2000) (illustrating civil RICO suit against trading card company).

40. See Halperin, *supra* note 1 (identifying children's abnormal behavior). For a discussion of the requirements for a civil RICO claim, see *infra* notes 41-82 and accompanying text.

41. See 18 U.S.C. § 1964(c) (2000) ("Any person injured in his business or property . . . may sue . . . in any United States district court . . ."); see also Cassidy, *supra* note 35, at 470 ("In the last decade . . . RICO has become an increasingly popular . . . tool in general civil litigation . . .").

42. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) [hereinafter *Sedima II*]. The Court adapted this list of requirements from 18 U.S.C. § 1962. See *id.* at 482-83.

43. 18 U.S.C. § 1964(c) (2000); see also Luccaro et al., *supra* note 38, at 1262-68 (providing general description of civil RICO requirements). For a detailed analysis of each civil RICO element, see *infra* notes 44-82 and accompanying text.

1. *Standing*

Before a court considers the four primary elements required for a RICO claim, it first must determine whether the plaintiff has standing to sue.⁴⁴ The standing requirement ensures that “the liberal construction clause [does not amount to] an invitation to apply RICO to new purposes that Congress never intended.”⁴⁵

The Supreme Court in *Sedima, S.P.R.L. v. Imrex Co.*,⁴⁶ while dispelling prior courts’ concerns that civil RICO relief exceeded its intended limits, insisted the statutory language unambiguously relayed Congress’s broad intent.⁴⁷ The main issue in that case was whether the civil RICO plaintiff’s injury “must be somehow different in kind from the direct injury resulting from the predicate acts of racketeering activity.”⁴⁸ The district court found a civil RICO plaintiff must allege some “RICO-type injury” or “racketeering injury” distinct from that resulting from the “predicate act.”⁴⁹

The Second Circuit emphasized the necessity for a “racketeering injury” because to require less would overextend congressional intent.⁵⁰ The Supreme Court refused to adhere to the Second Circuit’s notion of a “racketeering injury” and noted, “[a] reading of the statute belies any such requirement.”⁵¹ The Court ultimately

44. See GREGORY P. JOSEPH, CIVIL RICO: A DEFINITIVE GUIDE 30 (ABA Publ’g 2d ed. 2000) (“Unless the plaintiff can demonstrate actual harm, [he or she] may not maintain an action.”).

45. Cassidy, *supra* note 35, at 479 (citing *Reves v. Ernst & Young*, 570 U.S. 170 (1993)); see also *Steele v. Hosp. Corp. of Am.*, 36 F.3d 69, 70 (9th Cir. 1994) (quoting *Oscar v. Univ. Students Co-Op Ass’n*, 956 F.2d 783, 786 (9th Cir. 1992)) (noting courts want to ensure “RICO is not expanded to provide a ‘federal cause of action and treble damages to every tort plaintiff’”). For a brief mention of the liberal construction clause, see *supra* note 38 and accompanying text.

46. *Sedima II*, 473 U.S. 479 (1985).

47. See *id.* at 497 (“RICO is to be read broadly[.]”).

48. *Id.* at 484. The plaintiff alleged that the illicit mail and wire fraud activities, which qualified the defendant for RICO under 18 U.S.C. § 1962, also caused the injury to its business, which satisfied the 18 U.S.C. § 1964(c) requirement. See *id.* (explaining plaintiffs’ allegations). For a discussion of what constitutes “predicate acts,” see *infra* notes 79-82 and accompanying text.

49. See *Sedima II*, 473 U.S. at 484. (discussing type of injury required). If an individual illegally gambled causing injury to another, the predicate act would be the gambling. See *id.* The district court required an injury *separate* from that resulting from the predicate act. See *id.*

50. See *id.* at 495 (citing *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 492 (2d Cir. 1984) [hereinafter *Sedima I*]). The Second Circuit labeled the “racketeering injury” requirement an “obligation that the plaintiff show injury different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter.” *Sedima I*, 741 F.2d at 496.

51. *Sedima II*, 473 U.S. at 495. The Court continued:

held that “the compensable injury necessarily is the harm caused by predicate acts.”⁵²

Seven years later, in *Holmes v. Securities Investor Protection Corp.*,⁵³ the Supreme Court further qualified standing under RICO by requiring proximate cause between the illicit activity and the injury.⁵⁴ In that case, the plaintiff corporation sued Holmes under RICO, among other claims, for “conspir[ing] in a stock-manipulation scheme” that forced the corporation to reimburse customers.⁵⁵ The district court found for Holmes on the RICO claim because the plaintiff “had [not] satisfied the ‘proximate cause requirement under RICO.’”⁵⁶ The Ninth Circuit reversed, finding error in the district court’s reasoning that Holmes’s individual predicate acts actually must have injured the plaintiff.⁵⁷

The Supreme Court reversed the circuit court’s findings “because the alleged conspiracy to manipulate did not proximately cause the injury claimed,” and the plaintiff’s claim did not “make out a right to sue petitioner under [18 U.S.C.] § 1964(c).”⁵⁸ The Court looked to statutes upon which Congress modeled RICO to determine that the “by reason of” language in 18 U.S.C. § 1964(c) required a showing of proximate cause between the predicate act

If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under [18 U.S.C.] § 1964(c). There is no room in the statutory language for an additional, amorphous “racketeering injury” requirement.

Id.

52. *Id.* at 497; see also Luccaro et al., *supra* note 38, at 1266 (discussing merits of standing).

53. 503 U.S. 258 (1992).

54. See Luccaro et al., *supra* note 38, at 1267 (citing *Holmes*, 503 U.S. at 268).

55. See *Holmes*, 503 U.S. at 261. The plaintiff specifically alleged Holmes “made false statements about the prospects of one of the six companies . . . of which he was an officer, director, and major shareholder; and that over an extended period he sold small amounts of stock in one of the other six companies . . . to simulate a liquid market.” *Id.* at 263. The plaintiff attempted to subrogate the claims of individual “nonpurchasing customers” who were remote from the injury caused to the brokers. See *id.* at 270-74. The brokers went bankrupt due to the defendant’s conspiracy, and the “nonpurchasing customers” were customers of the brokers who had no financial ties to the tainted stock. See *id.* at 272. Nevertheless, they could not recover from the bankrupt brokers. See *id.* Because the plaintiff had to reimburse the “nonpurchasing customers” for their losses, the plaintiff attempted to subrogate to their non-existing claim. See *id.* at 270-74.

56. *Id.* at 264.

57. See *id.* (“[T]he appeals court held the finding of no proximate cause to be error, the result of a mistaken focus on the causal relation between [the plaintiff’s] injury and the acts of Holmes alone.”).

58. *Id.* at 275. The Court admitted it generally “use[d] ‘proximate cause’ to label generically the judicial tools used to limit a person’s responsibility for the consequences of that person’s own acts.” *Id.* at 268.

and the resulting injury.⁵⁹ Despite the plaintiff's assertions, the Court denied it was acting "illiberal in [its] construction" of the statutes, and held that only the proper, proximately situated plaintiff could utilize RICO in a civil context.⁶⁰

No court has construed plainly the meaning of "business or property," but the Second Circuit noted, "[t]he requirement that the injury be to the plaintiff's business or property means that the plaintiff must show a proprietary type of damage."⁶¹ Instead of providing a concrete rule or test, many courts have defined effectively "business or property" by limiting its application.⁶² Essentially,

59. See *id.* at 267-68. The Court compared RICO to section 4 of the Clayton Act, which contained similar language. See *id.* at 267-68; see also Clayton Act § 4, 15 U.S.C. § 15 (2000) (original version at ch. 323, § 4, 38 Stat. 730, 731-32 (1914)). The Court further noted that in *Associated General Contractors, Inc. v. Carpenters*, 459 U.S. 519 (1983), it had "held that a plaintiff's right to sue under § 4 [of the Clayton Act] required a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." *Holmes*, 503 U.S. at 268. In turn, the Court:

[C]redit[ed] the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used . . . in the Clayton Act's § 4. . . . It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.

Id.

60. See *Holmes*, 503 U.S. at 274. The Court rationalized:

[W]e fear that RICO's remedial purposes would more probably be hobbled than helped by [the plaintiff's] version of liberal construction: Allowing suits by those injured *only indirectly* would open the door to "massive and complex damages litigation [that would] not only burden the courts, but [would] also undermine the effectiveness of treble-damages suits."

Id. (quoting *Associated Gen. Contractors*, 459 U.S. at 545) (emphasis added).

61. *Bankers Trust Co. v. Rhoades*, 741 F.2d 511, 515 (2d Cir. 1984); see also *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc.*, 29 F. Supp. 2d 801, 821 (N.D. Ohio 1998) (noting proprietary nature of "business or property").

62. See *Oscar v. Univ. Students Co-Op. Ass'n*, 965 F.2d 783, 786 (9th Cir. 1992) (holding nuisance to property insufficient for RICO standing); *Taffet v. S. Co.*, 967 F.2d 1483, 1488 (11th Cir. 1992) (stating fraudulent rate increases by utility companies provided no cognizable RICO damage to utility customers); *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990) ("[P]ersonal injury, including emotional distress, is not compensable under [18 U.S.C.] § 1964(c) of RICO."); *Sears v. Likens*, 912 F.2d 889, 892 (7th Cir. 1990) (finding shareholders unable to bring RICO claim for diminution in stock values caused by injuries to corporation); *Bass v. Campagnone*, 838 F.2d 10, 11-12 (1st Cir. 1988) (determining financial damage to local union by officer's RICO violation did not give individual union members standing to sue); *Grogan v. Platt*, 835 F.2d 844, 847 (11th Cir. 1988) ("[P]ecuniary losses are so fundamentally a part of personal injuries that they should be considered something other than injury to 'business or property.'"); *Carter v. Berger*, 777 F.2d 1173, 1174 (7th Cir. 1985) (deciding taxpayers could not seek RICO action for tax increases due to illegal bribery); see also JOSEPH, *supra* note 44, at 33 ("Creditors, including guarantors, are generally held to have no more standing to sue than shareholders for RICO violations perpetrated on a debtor corporation.").

plaintiffs have standing if they can show they “[have] suffered a concrete financial loss . . . proximately caused by the fraudulent conduct.”⁶³ If illegal gambling were the illicit activity for which one sued, he or she must prove a proprietary injury that extends beyond mere loss of money or loss of chance.⁶⁴

2. *Conduct*

Once a plaintiff attains standing, he or she must then satisfy the four customary RICO requirements.⁶⁵ The “conduct” element simply requires the defendant to “[conduct] or [participate] in the conduct or the affairs of [an] enterprise,” but not without some intricacies.⁶⁶ The Supreme Court requires the “defendant’s predicate acts [to] ‘rise to the level’ of participation in the management or operation of the enterprise.”⁶⁷ The Court further extends this description to the enterprise’s professional advisors, such as attorneys and accountants.⁶⁸ Still, no matter how broadly courts expand the scope, “the [individual’s] involvement must rise to the level of decision-making.”⁶⁹

3. *Enterprise*

The RICO statute clearly defines an “enterprise” as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although

63. *Fireman’s Fund Ins. Co. v. Stites*, 258 F.3d 1016, 1021 (9th Cir. 2001) (citing *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1481 (9th Cir. 1994)).

64. See 18 U.S.C. § 1964(c) (2000). For an in-depth discussion of courts’ suggestions as to satisfying the injury requirement for a RICO claim in the gambling context, see *infra* notes 131-32, 138-39 and accompanying text.

65. See 18 U.S.C. §§ 1962, 1964(c) (2000). For a list of the standard RICO requirements, see *supra* notes 42-43 and accompanying text.

66. *Luccaro et al.*, *supra* note 38, at 1236 (citing 18 U.S.C. § 1962(c)).

67. *Id.* (citing *Reves v. Ernst & Young*, 507 U.S. 170, 177-95 (1993)). The authors noted: “Actions involving a low degree of decision-making may not constitute participation in the affairs of the enterprise. One must play some role in directing the affairs of the enterprise to ‘conduct or participate’ in the affairs of the enterprise.” *Id.*

68. See *id.* at 1236-37. The authors added that the enterprise may be “‘operated’” or “‘managed’” by others “‘associated with’” the enterprise who exert control over it as, for example, by bribery.” *Id.* (quoting *Reves*, 507 U.S. at 184). The lower courts even have “extended RICO liability to employees who carry out instructions.” *Id.* (citing *United States v. Diaz*, 176 F.3d 52, 92-93 (2d Cir. 1999); *United States v. Darden*, 70 F.3d 1507, 1543 (8th Cir. 1995); *MCM Partners, Inc. v. Andrews-Bartlett & Assocs.*, 62 F.3d 967, 974 (7th Cir. 1995)).

69. *Id.* (citing *United States v. Swan*, 224 F.3d 632, 635 (7th Cir. 2000); *Bancoklahoma Mortgage Corp. v. Capital Title Co.*, 194 F.3d 1089, 1101 (10th Cir. 1999); *Bachman v. Bear, Stearns & Co.*, 178 F.3d 930, 932-33 (7th Cir. 1999)).

not a legal entity.”⁷⁰ The Supreme Court has determined that enterprises need not have an economic motive to satisfy the requirement.⁷¹ The Court also has approved of both legitimate and illegitimate enterprises, even though the statute does not encompass both explicitly.⁷² Lower courts have expanded the Court’s liberal construction even further.⁷³ This breadth ensures that “[w]hen a ‘legal’ entity is the enterprise under consideration, ‘there [will be] little difficulty in proving the existence of the enterprise [because] proof that the entity in question has a legal existence satisfies the enterprise element.’”⁷⁴

4. *Pattern*

The RICO “pattern” constraint “requires at least two acts of racketeering activity . . . the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.”⁷⁵ The Supreme Court has inter-

70. 18 U.S.C. § 1961(4) (2000). Nevertheless:
To violate RICO, a person must either, directly or indirectly, acquire interests in or administer an “enterprise.” . . . It is immaterial whether the defendant has a stake in the . . . enterprise. . . . [I]n an action under [18 U.S.C.] § 1962(c) all circuits now require that the “person” be separate from the “enterprise” which conducts its affairs through a pattern of racketeering.

Luccaro et al., *supra* note 38, at 1223, 1231.

71. See *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 249 (1994) (showing no need for enterprise to have economic motive).

72. See *United States v. Turkette*, 452 U.S. 576, 580-87 (1981) (holding drug trafficking organization to be RICO enterprise). “Because the Court could not find any indication in the legislative history that such illegitimate associations were *not* to be considered ‘enterprises,’ it opted instead for the broader definition which expanded the range of activities that RICO covered.” David Kurzweil, *Criminal and Civil RICO: Traditional Canons of Statutory Interpretation and the Liberal Construction Clause*, 30 COLUM. J.L. & SOC. PROBS. 41, 79 (1996).

73. See *United States v. Rogers*, 89 F.3d 1326, 1337 (7th Cir. 1996) (finding criminal gang constitutes enterprise); *United States v. Beasley*, 72 F.3d 1518, 1525 (11th Cir. 1996) (holding religious cult to be enterprise); *United States v. London*, 66 F.3d 1227, 1243 (1st Cir. 1995) (determining sole proprietorship employing at least one other person could be RICO enterprise); *Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 263 (2d Cir. 1995) (treating two corporations owned by same individual as enterprise); *United States v. Freeman*, 6 F.3d 586, 597 (9th Cir. 1993) (including governmental entities as enterprises); *Am. Mfrs. Mut. Ins. Co. v. Townson*, 912 F. Supp. 291, 295 (E.D. Tenn. 1995) (finding marriage suitable as enterprise). *But see Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989) (“An inanimate object such as an apartment cannot constitute a RICO enterprise.”).

74. Luccaro et al., *supra* note 38, at 1227. “A restrictive definition of enterprise excluding legal entities from its scope would [] lead to the bizarre result that only criminals who failed to form corporate shells to aid their illicit schemes could be reached by RICO.” *Id.* at 1224.

75. 18 U.S.C. § 1961(5) (2000). “Where a single action violates more than one of the [racketeering activities] recited in [18 U.S.C.] section 1961(1), it consti-

preted this simple statutory language to require “continuous and interrelated” activity.⁷⁶ RICO claims should be dismissed “at the earliest possible stage of the litigation, unless the plaintiff specifically alleges that the RICO acts occurred over an extended period of time (at least one year).”⁷⁷ Courts essentially agree that “legislative history indicate[s] that a ‘pattern of racketeering activity’ [is] to be flexible and based on ‘a commonsense, everyday understanding of RICO’s language and Congress’ gloss on it.’”⁷⁸

5. Racketeering Activity

The “racketeering activity” requirement encompasses “nine classes of state criminal felony laws, any act ‘indictable’ under fifty-four specific federal criminal provisions, any federal ‘offense’ involving bankruptcy or securities fraud, and any narcotics-related ac-

tutes *only a single* predicate act for RICO purposes, *not multiple* predicate acts.” JOSEPH, *supra* note 44, at 80-81 (emphasis added) (citing *United States v. Walgren*, 885 F.2d 1417 (9th Cir. 1989)).

76. See Luccaro et al., *supra* note 38, at 1218 (“RICO does not target sporadic activity.”). “Based on legislative history, the Supreme Court [in *H.J. Inc. v. Northwestern Bell Telephone Co.*] determined that ‘to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity.’” William E. Marple, “Pattern” Requirement Renders RICO Inapplicable to Ordinary Business Disputes, 14 REV. LITIG. 343, 349 (1995) (quoting *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989)). “The ‘continuity’ component is met by either closed-ended continuity, defined as ‘a series of related predicates extending over a substantial period of time,’ or open-ended continuity, defined as conduct that poses a threat of extending into the future.” Luccaro et al., *supra* note 38, at 1219 (quoting *H.J. Inc.*, 492 U.S. at 242). “The Court recognized that its definition of ‘pattern of racketeering activity’ would apply in criminal as well as civil actions.” Kurzweil, *supra* note 72, at 85 (citing *H.J. Inc.*, 492 U.S. at 255 (Scalia, J., concurring)).

77. Marple, *supra* note 76, at 364. Limiting the scope in this way: [M]inimizes the time, effort, and money that defendants must expend to obtain dismissal of baseless RICO allegations. . . . [I]t prevents the unwarranted besmirching of the reputations of respectable businesses and their employees that inevitably results from explicit or implicit allegations of racketeering. . . . [And] it prevents the needless clogging of the federal civil docket with RICO cases, many of which lack any basis for federal jurisdiction.

Id. at 364-65.

78. Kurzweil, *supra* note 72, at 85 (quoting *H.J. Inc.*, 492 U.S. at 241). This common-sense approach helps courts to determine:

[A]rchetypical mobster activity, such as a hoodlum selling “insurance” to a neighborhood’s storekeepers with a warning that he will reappear each month to collect the “premium,” supplies the requisite threat of continuity. In the case of an otherwise legitimate business, the continuity prong of the pattern requirement could be demonstrated by showing that the predicate acts are a “regular way of conducting [the] ongoing legitimate business.”

Marple, *supra* note 76, at 349 (quoting *H.J. Inc.*, 492 U.S. at 242-43).

tivities 'punishable' under federal law."⁷⁹ Congress targeted these activities because they are the types habitually performed by the criminal organizations that it sought to eradicate.⁸⁰ Although "racketeering activity" generally is treated as a separate element, some courts and scholars link it with the "pattern" component, and consider the combination to be the essential RICO requirement.⁸¹ The statute would serve no realistic purpose if not for this requirement.⁸²

C. Gambling as a Racketeering Activity

Illegal gambling is one of the many racketeering activities against which RICO protects.⁸³ While the RICO statute specifically mentions three federal laws prohibiting certain gambling activities, it also allows individual state laws to dictate what constitutes illegal gambling.⁸⁴ Therefore, if individuals habitually breach either the specified federal gambling laws or an individual state gambling regulation, they fulfill the "pattern" and "racketeering activity" RICO requirements.⁸⁵

The three gambling-related federal statutes that can trigger a RICO action cover a wide variety of gambling activities.⁸⁶ Two of them involve the transmission and transportation of wagering information and paraphernalia.⁸⁷ The third is broader, defining illegal

79. Cassidy, *supra* note 35, at 472-73 ("These crimes are termed 'predicate acts' for the act of racketeering."); see also 18 U.S.C. § 1961(1) (2000). For a list of the nine classes, see *supra* note 37.

80. See Babb, *supra* note 36, at 1150-51 n.14 (discussing congressional intent). For more discussion on the history and intent of RICO, see *supra* notes 35-38 and accompanying text.

81. See Babb, *supra* note 36, at 1152 ("The focal point of RICO is the pattern of racketeering activity requirement.").

82. See 18 U.S.C. § 1962 (2000). For a discussion of the purpose of the RICO statute, see *supra* notes 35-38 and accompanying text.

83. See 18 U.S.C. § 1961(1) (2000) (listing gambling as racketeering activity).

84. See *id.* (determining what constitutes gambling activity). This section specifically lists 18 U.S.C. §§ 1084, 1953, and 1955 as federal statutes dealing with illegal gambling activities. See *id.* For a thorough discussion of these three statutes, see *infra* notes 86-89 and accompanying text.

85. See 18 U.S.C. § 1962 (identifying requirements for filing of RICO action). For a discussion of the pattern and racketeering activity RICO requirements, see *supra* notes 75-82 and accompanying text.

86. See 18 U.S.C. §§ 1084, 1953, 1955 (2000). For an in-depth treatment of these statutes, see *infra* notes 87-89 and accompanying text.

87. See 18 U.S.C. § 1084(a) (prohibiting gambling using wire communications); 18 U.S.C. § 1953 (targeting transportation of gambling devices). Section 1084(a) specifically states:

Whoever . . . uses a wire communication facility for the transmission . . . of bets or wagers or information assisting in the placing of bets or wagers[,] . . . or for the transmission of a wire communication which entitles

gambling businesses and outlining the penalties for the prohibited activities in which they participate.⁸⁸ Despite the latter statute's federal codification, it expressly relies upon states' gambling regulations.⁸⁹

California prohibits various gambling activities.⁹⁰ Although the state constitution permits the state-run operation of the California State Lottery, it prohibits other types of lotteries.⁹¹ The California Legislature broadly defined the term lottery, but its extensions are indefinite.⁹² In California, a lottery exists when a scheme or

the recipient to receive money or credit [from] bets or wagers, or for information assisting in the placing of bets or wagers, shall be [punished].

18 U.S.C. § 1084(a). Section 1953 specifies, "[w]hoever . . . knowingly carries or sends . . . any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used [for] . . . (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be [punished]." *Id.* § 1953(a).

88. *See* 18 U.S.C. § 1955(a) ("Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be [punished]."). Section 1955(b) defines gambling business as illegal when it: "(i) [violates] the law of a State or political subdivision in which it [conducts its business]; (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has been or remains in substantially continuous operation." *Id.* § 1955(b)(1). The statute also defines gambling as "includ[ing] but . . . not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein." *Id.* § 1955(b)(2) (emphasis added).

89. *See id.* § 1955(b)(1)(i) (defining illegal gambling business as "violation of the law of a State or political subdivision in which it is conducted").

90. *See* CAL. CONST. art. IV, § 19(a), (e) (discussing California's prohibition of casinos and lotteries other than California State Lottery). *But see* CAL. CONST. art. IV, § 19(b), (d), (f), (g) (allowing regulation of horse races, authorization of bingo games, and negotiation with Native Americans and nonprofit organizations desiring to conduct illegal gambling activities).

91. *See* CAL. CONST. art. IV, § 19(d) (permitting "establishment of a California State Lottery"). Section 19(a) denies the state legislature power to authorize lotteries and prohibit the sale of lottery tickets within the state. *See id.* § 19(a).

92. *See* CAL. PENAL CODE § 319 (West 2002). The code defines lottery as follows:

A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift-enterprise, or by whatever name the same may be known.

Id.; *see also* RUFUS KING, GAMBLING & ORGANIZED CRIME 51-52 (1969). "The lottery category [of gambling] is perhaps the oldest in gambling, and also the broadest in scope. . . . Each of [the elements of lotteries] has given rise to argument and confusion, and all have been extensively litigated in U.S. courts." *Id.* at 52.

operation incorporates the elements of consideration, chance, and prize.⁹³

The consideration element "is the fee (in the form of money or anything else of value) that a participant pays the operator for entrance."⁹⁴ Courts should determine this element from the position of the plaintiff rather than the defendant.⁹⁵ The plaintiffs' position in relation to certain schemes can determine the satisfaction of the consideration requirement.⁹⁶

The chance element requires "winning and losing [to] depend on luck and fortune rather than, or at least more than, judgment and skill."⁹⁷ All parties to the activity must understand and agree to this dependence.⁹⁸ While a participant's skill or lack thereof may

93. See *People v. Cardas*, 28 P.2d 99, 100 (Cal. App. Dep't Super. Ct. 1933) ("An analysis of [CAL. PENAL CODE § 319] and an examination of the authorities construing it and other similar statutory provisions disclose that there are three elements necessary to constitute a lottery."); *People v. Hecht*, 3 P.2d 399, 401 (Cal. App. Dep't Super. Ct. 1931) ("In order to decide whether the scheme adopted in this case was a lottery, it must be determined whether the [three listed] elements are present.").

94. *Hotel Employees & Rest. Employees Int'l Union v. Davis*, 88 Cal. Rptr. 2d 56, 62 (1999) (citing *Cal. Gas Retailers v. Regal Petroleum Corp.*, 330 P.2d 778 (Cal. 1958)). Consideration has been defined more simply as including "one who has hazarded something of value upon the chance" of receiving a prize. *Hecht*, 3 P.2d at 401.

95. See *Cardas*, 28 P.2d at 100 ("The question of consideration is not to be determined from the standpoint of the defendant, but from that of the holders of prize tickets.").

96. See, e.g., *Cal. Gas Retailers*, 330 P.2d at 785 (finding absence of consideration where chances to receive free gasoline were given away to both paying customers and non-paying public); *Cardas*, 28 P.2d at 100-01 (finding no consideration where lottery ticket holders indiscriminately received their prize chances from the same company that required no further purchase of admission ticket or any other product). The *Cardas* court noted two instances similar to its case where courts tended to find lotteries:

In one group it will be found that the prize tickets were only furnished to customers—those who purchased something. The payment made by the customer was for both the article purchased and the prize ticket—part of the consideration was for the ticket. . . . In the other group, it will be found that, while the distribution of prize tickets purported to be both to noncustomers as well as to customers, in fact the distribution to the former class was negligible.

Id. at 101 (citing *State v. Powell*, 212 N.W. 169 (Minn. 1927); *Featherstone v. Indep. Serv. Station Ass'n*, 10 S.W.2d 124 (Tex. 1928); *Matta v. Katsoulas*, 212 N.W. 261 (Wis. 1927)).

97. *Davis*, 88 Cal. Rptr. 2d at 62 (citing *Finster v. Keller*, 96 Cal. Rptr. 241 (Cal. Ct. App. 1971); *Hecht*, 3 P.2d at 399).

98. See *Finster*, 96 Cal. Rptr. at 245-46 ("There must be an understanding, agreement or expectation the distribution will be determined by chance."). To uphold the element, the chance of receiving the prize must be "independent of the will of the manager of the game, according to a scheme held out to the public, whether he who paid the money should have the prize or nothing." *Id.* at 246 n.3 (quoting *Commonwealth v. Sullivan*, 15 N.E. 491, 494 (Mass. 1888)).

affect the outcome, courts look more to the character of the activity to determine whether it is one of chance or skill.⁹⁹ The courts make this determination by deciding which element more greatly influences the activity.¹⁰⁰

The prize element “encompasses property that the operator offers to distribute to one or more winning participants and not to keep for himself.”¹⁰¹ The prize may be something separate from the consideration paid for the activity—e.g., a vacation or car—or it may derive from the accumulation of consideration—e.g., a money raffle.¹⁰² Either way, the participant must know the prize’s identity before commencing the activity.¹⁰³ This fixture preserves the character of the lottery and distinguishes it from a “banking game,” where the prize value may vary and the activity’s operator may keep it, if uncollected.¹⁰⁴ The nature of a lottery ensures that *some* participant will win the designated prize.¹⁰⁵

Another California statute, which can relate to gambling activity and may affect a RICO action, is the California Business and Professions Code.¹⁰⁶ The act specifically seeks to prohibit “any un-

99. *See id.* at 246 (“It is the character of the game rather than a particular player’s skill or lack of it that determines whether the game is one of chance or skill.”).

100. *See id.* (declaring test to be whether chance or skill is “the dominating factor in determining the result of the game”). *Finster* involved an elaborate betting scheme at a horse track where experienced and inexperienced bettors placed wagers. *See id.* at 241. Even though the experienced bettors, because of their skill, may have had a *better* chance than those without experience, the court still determined, “if skill and judgment be assumed upon the part of all the players, the known results in many instances [still] show a large element of chance.” *Id.* at 244-46.

101. *Davis*, 88 Cal. Rptr. 2d at 62 (citing *W. Telecon, Inc. v. Cal. State Lottery*, 917 P.2d 651, 655-57 (Cal. 1996)).

102. *See id.* (“The property offered may exist apart from the fees the participants pay the operator or it may arise from the fees themselves.”).

103. *See id.* (“The prize or prizes, however, must be ‘either fixed in advance’ of the play or ‘determined by the total amount’ of fees paid.”).

104. *See W. Telecon*, 917 P.2d at 655-58. A lottery operator has “no interest in the outcome” because the disposition of the prize does not “[depend] upon which, or how many, of the lottery entrants might win it.” *Id.* at 657. By contrast, a banking game operator does have an interest “because the amount of money the operator will have to pay out depends upon whether each of the individual bets is won or lost.” *Id.*

105. *See id.* at 655 (“A lottery must involve distribution of one or more prizes.”).

106. *See* CAL. BUS. & PROF. CODE §§ 17200, 17202, 17203, 17206 (West 1997) (outlining method for bringing action for unfair competition); *see also* *Dumas v. Major League Baseball Props., Inc.*, 52 F. Supp. 2d 1170, 1172 (S.D. Cal. 1999) [hereinafter *Dumas I*] (introducing plaintiff’s use of statute to bring state claim adjacent to RICO claim); *Schwartz v. Upper Deck Co.*, 967 F. Supp. 405, 406 (S.D. Cal. 1997) [hereinafter *Schwartz II*] (considering plaintiffs’ use of statute to bring

lawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.”¹⁰⁷ While this facilitates a California state claim, the principles upon which it is based also could help to support elements of an alternative RICO claim.¹⁰⁸

D. Trading Cards for Complaints

The type of irregular behavior that trading cards have caused in children—like that highlighted at the beginning of this Note—have caused great fear and subsequent response among parents.¹⁰⁹ Within the last decade, individuals throughout the country have attempted to bring claims against trading card manufacturers for state gambling law violations and subsequent RICO violations.¹¹⁰ The claims in each jurisdiction have been similar—that by randomly inserting valuable “chase cards” into trading card packages, card manufacturers create illegal lotteries, punishable under state

alternative state claim). For more treatment of *Dumas I* and *Schwartz II*, see *infra* notes 135, 159-60, 171-72 and accompanying text.

107. CAL. BUS. & PROF. CODE § 17200 (West 1997). Section 17202 states: “[S]pecific or preventive relief may be granted to enforce a penalty, forfeiture, or penal law in a case of unfair competition.” *Id.* § 17202. Section 17203 authorizes courts to enjoin and “make such orders or judgments . . . as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition.” *Id.* § 17203. Section 17206 lists the various remedies available to civil plaintiffs. See *id.* § 17206.

108. See, e.g., *Dumas II*, 104 F. Supp. 2d 1220, 1223 (S.D. Cal. 2000) (discussing plaintiffs’ failure to achieve proper RICO standing by asserting injury from “fraudulent or dishonest conduct”). “There is no allegation that Defendants have engaged in any sort of fraudulent or dishonest conduct such as misrepresenting to purchasers the odds of winning a chase card.” *Id.* For a more in-depth discussion of *Dumas II*, see *infra* notes 133-39 and accompanying text. For an outline of the elements of a RICO action, see *supra* notes 41-82 and accompanying text.

109. See *Kent*, *supra* note 4. For a discussion of children’s erratic behavior, see *supra* notes 1, 7-15 and accompanying text.

110. See, e.g., *Chaset v. Fleer/Skybox Int’l, LP*, 300 F.3d 1083, 1086 (9th Cir. 2002) (consolidating numerous district court cases within Ninth Circuit, where individual trading card purchasers and traders sought relief from trading card companies under RICO); *Price II*, 138 F.3d 602, 604 (5th Cir. 1998) (hearing appeal of class-action suit brought by certain individuals asserting right to damages under RICO for alleged gambling violations by trading card manufacturer); *MLB Props.*, 105 F. Supp. 2d 46, 48 (E.D.N.Y. 2000) (hearing action for declaratory judgment by trading card manufacturers and licensors against individual card purchasers and traders seeking to sue for RICO violation). For a thorough treatment of these cases, see *infra* notes 117-50 and accompanying text. For a discussion of the elements of a RICO action, see *supra* notes 41-82 and accompanying text. For an assessment of what constitutes gambling, see *supra* notes 83-105 and accompanying text.

gambling laws and the RICO Act.¹¹¹ The courts have been reluctant to validate these arguments.¹¹²

While the litigation is a modern trend, the sentiments of the litigants are not new, nor are they exclusive to the *Pokémon* realm.¹¹³ Most people probably remember *Beanie Babies* and *Pogs*, but they probably remember them solely as a trend, and forget the uproar they caused during their peaks in popularity.¹¹⁴ As the fads have evolved from marbles to *Pogs* to *Beanie Babies* to *Pokémon*, the competition among children fostered by each activity has mirrored its predecessors, but the responses by adults have changed greatly.¹¹⁵ While winning an opponent's marbles on a playground used to be allowed, doing so with *Pogs* was not, and now attempting to trade *Pokémon* cards in any fashion has spawned numerous lawsuits.¹¹⁶

The first such case was *Price v. Pinnacle Brands, Inc.*¹¹⁷ The plaintiffs filed a class action suit and "contend[ed] that the [defendant trading card manufacturer was] engaged in an enterprise of illegal gambling which caused them harm; namely, that [the defendant was] engaged in a gambling conspiracy with [professional sports leagues, players' associations,] and other sports entities."¹¹⁸

111. See, e.g., *Chaset*, 300 F.3d at 1086 ("The plaintiffs asserted that the marketing and distribution of trading cards constituted gambling, a RICO violation, because the essential elements of gambling . . . were all present."). For a discussion of the elements of a RICO suit, see *supra* notes 41-82 and accompanying text. For an analysis of California gambling laws and their required elements, see *supra* notes 90-105 and accompanying text.

112. See, e.g., *Price II*, 138 F.3d at 605, 608 (affirming district court's holding that plaintiff had not established proper standing to maintain successful RICO action). For more on *Price II*, see *infra* notes 117-22 and accompanying text.

113. See *High-Stakes Pogging: Is It Too Intense for Sensitive Children to Endure?*, 9 CAN. BUS. & CURRENT AFF. 29, 29 (1995) (noting public belief that *Pogs* encouraged gambling among children).

114. See *id.* ("[M]any school administrators . . . banned pogging, claiming that it [was] a form of gambling that leads to fist fights and delinquency from studies."); see also Mike Burns, *Marbles, Pogs and Other Life Lessons*, BALT. SUN, Feb. 5, 1995, at 4C (discussing how Baltimore schools banned pogs because of their gambling influences); I. Nelson Rose, *Betting on Beanie Babies*, at <http://www.gamblingandthelaw.com/beanie.html> (last visited Mar. 10, 2003) (insisting *Beanie Baby* trading encouraged gambling).

115. See Burns, *supra* note 114, at 4C (noting similarities between marbles and *Pogs*, but commenting marbles were *not* banned in schools in their heyday, while *Pogs* were); Rose, *supra* note 114 (arguing *Beanie Babies* had become "collectibles of the betting generation").

116. See Burns, *supra* note 114, at 4C (noting permissibility of marbles on school grounds and impermissibility of *Pogs*); see also *Chaset*, 300 F.3d at 1085-88 (outlining most recent *Pokémon* case).

117. *Price II*, 138 F.3d 602 (5th Cir. 1998).

118. *Price v. Pinnacle Brands, Inc.*, No. 3:96-CV-2150-T, 1997 U.S. Dist. LEXIS 11698, at *2 (N.D. Tex. Apr. 2, 1998) [hereinafter *Price I*]. The class-action plaintiffs contended:

The district court granted the defendant's motion to dismiss for plaintiffs' failure to show damage to their business or property and thus establish standing under RICO.¹¹⁹

The Fifth Circuit agreed with the district court and refused to adhere to the plaintiffs' argument that their standing assertions were at least enough to survive the pleading stage.¹²⁰ The court also refused to determine standing by following the Southern District of California's rationale of analyzing the laws of New York and New Jersey, where the plaintiffs lived and purchased the cards.¹²¹ The Fifth Circuit ultimately concluded the only possible injury the plaintiff could claim would be an expectancy interest, which did not satisfy the RICO requirement.¹²²

[The defendant] market[ed] its cards by randomly inserting one or more valuable chase cards in sealed packages containing six to twenty cards. . . . The odds of obtaining a chase card are printed on the package. Plaintiffs contend[ed] this meets the definition of gambling, which requires consideration (the price of the pack), chance (chase cards are obtained by chance), and prize (chase cards have value).

Id. at *2-3 (citing *Wink v. Griffith Amusement Co.*, 100 S.W.2d 695, 701 (Tex. 1936)).

119. *See id.* at *3-7. The plaintiffs contended "[t]he amount of damages [was] the consideration paid . . . for the cards." *Id.* at *5. The court, however, agreed with the defendant that "[p]laintiffs [were] unable to plead cognizable RICO injury because they [were] not injured by virtue of their voluntary participation in a purchase for which they received their bargained for consideration. 'They got exactly what they paid for and they do not and cannot allege otherwise.'" *Id.* For an in-depth discussion of the standing requirement for a RICO suit, see *supra* notes 44-64 and accompanying text.

120. *See Price II*, 138 F.3d at 604-06 (affirming district court's decision to dismiss plaintiffs' RICO complaint).

121. *See id.* at 606-07 (citing *Schwartz II*, 967 F. Supp. 405, 411-15 (S.D. Cal. 1997); *Schwartz v. Upper Deck Co.*, 956 F. Supp. 1552, 1555 (S.D. Cal. 1997) [hereinafter *Schwartz I*]). The plaintiffs pleaded for the court to follow *Schwartz II* because they determined "New York and New Jersey recognize a person's property interest in money spent on games of chance and authorize civil actions to recover such funds." *Id.* at 606 (citing *Schwartz II*, 967 F. Supp. at 414-15 (citing N.Y. GEN. OBLIG. LAW § 5-423 (McKinney 1989); N.J. STAT. ANN. § 2A:40-5 (West 1987))). The Fifth Circuit instead followed the defendant's argument:

[I]f we were deciding whether [the defendant] had committed a state law predicate act, application of the [New York and New Jersey] state gambling laws would be necessary. . . . [T]he fact that a victim of gambling in New York or New Jersey has a state law remedy to recover an amount equal to a multiple of the money spent to gamble does not make plaintiffs' claim for its consideration a property loss under RICO.

Id. at 607.

122. *See Price II*, 138 F.3d at 607 (citing *In re Taxable Mun. Bond Sec. Litig.*, 51 F.3d 518, 523 (5th Cir. 1995)). "Injury to mere expectancy interests or to an 'intangible property interest' is not sufficient to confer RICO standing." *Id.* (citing *Heinold v. Perlstein*, 651 F. Supp. 1410, 1411 (E.D. Pa. 1987)). For a discussion of the requirements to establish standing for RICO, see *supra* notes 44-64 and accompanying text.

The Eastern District of New York decided a similar issue in *Major League Baseball Properties, Inc. v. Price*.¹²³ The trading card manufacturer plaintiffs sought a declaratory judgment and injunction against the card purchaser defendants to prevent them from bringing a RICO action because they lacked standing.¹²⁴ The defendants wished to sue the plaintiffs under RICO by claiming the manufacturing, marketing, and sale of trading card packages with randomly inserted “chase cards” constituted illegal gambling.¹²⁵

The district court noted the attorneys for the defendants “[had] shopped around to find a forum ‘friendly’ to their claims in order to induce a financial settlement.”¹²⁶ After briefly outlining the other jurisdictions’ analyses and holdings, the court indicated it would not sympathize with the defendants in their latest attempt to recover RICO damages.¹²⁷

The court specifically addressed and rejected the Southern District of California’s prior analysis of the New York statutes, upon which the defendants in this case relied in their RICO claim.¹²⁸ It first declared New York law could not furnish a gambling-related RICO “racketeering activity” for trading card purchasers.¹²⁹ Even if

123. *MLB Props.*, 105 F. Supp. 2d 46 (E.D.N.Y. 2000).

124. *See id.* at 48 (explaining plaintiff’s assertion that defendants could show no “[injury] in [their] business or property by reason of” acts allegedly in violation of RICO). The opinion came after the defendants moved to dismiss the action for failure to state a claim and for lack of jurisdiction. *See id.* (showing procedural history).

125. *See id.* (noting nature of defendants’ planned claims).

126. *Id.* Interestingly, the three primary cases considered in this Note, *Chaset*, *MLB Properties*, and *Price II*, share common parties—Jeffrey Fishman, Lance Kuba, Steven Price, and possibly others—who have attempted to bring almost identical claims for treble damages in the various jurisdictions. *See id.* at 46-56; *see also* *Chaset v. Fleer/Skybox Int’l, LP*, 300 F.3d 1083, 1086 (9th Cir. 2002); *Price II*, 138 F.3d at 604.

127. *See MLB Props.*, 105 F. Supp. 2d at 49. The court noted, “Congress enacted RICO ‘to combat organized crime, not to provide a federal cause of action and treble damages’ for personal injuries.” *Id.* (quoting *Oscar v. Univ. Students Co-Op. Ass’n*, 965 F.2d 783, 785 (9th Cir. 1992)).

128. *See id.* at 50-52 (discussing court’s assumption that selling trading cards meets RICO definition of “racketeering activity”).

129. *See id.* at 51 (“[N]o statutory provision in New York law penalizes the individual sale to a ‘person’ of a pack of trading cards with ‘imprisonment for more than one year.’”). The court insisted it could not utilize the statute upon which the California court relied—New York Penal Law section 225.10—because its application required an individual to have paid “more than five hundred dollars in any one day of money played in such scheme or enterprise.” *Id.* (citing N.Y. PENAL LAW § 225.10 (McKinney 2000)). Even though it may be possible for an individual trading card purchaser to meet this requirement, the defendants in this case could not show in their pleadings that they had done so. *See id.* Additionally, the court said the only statute that could possibly prohibit the alleged illicit trading card activity would be New York Penal Law section 225.05. *See id.* That statute

the court was able to find an applicable state law and requisite racketeering activity, it refused to follow the California court's finding that the defendants could establish the required standing.¹³⁰ The court admitted it would possibly change its opinion if a trading card purchaser proved some sort of marketing "swindle."¹³¹ Nevertheless, the defendants had not made such an allegation and the court declared the defendants could not establish a RICO action.¹³²

With these cases pending in the Fifth Circuit and the Eastern District of New York, many of the same plaintiffs filed claims in the Southern District of California.¹³³ The plaintiffs purchased trading cards hoping to receive "chase cards," and sued various trading card companies for illegal gambling under RICO.¹³⁴ The district

"makes someone guilty of the misdemeanor offense of 'promoting gambling in the second degree when he knowingly advances or profits from unlawful gambling activity.'" *Id.* (quoting N.Y. PENAL LAW § 225.05 (McKinney 2000)). Because this offense does not constitute a felony, however, it cannot be a "racketeering activity" under RICO. *See id.* For a discussion of what constitutes a "racketeering activity," see *supra* notes 79-82 and accompanying text.

130. *See MLB Props.*, 105 F. Supp. 2d at 51 ("[T]his court does not adopt the California District Court's analysis as to the nature of the actual transaction and the New York statutory right to recover gambling losses."). The court maintained that the card purchasers received compensation for what they paid—"a random assortment of regular cards and a chance to receive an insert card"—which "delivers actual value to each party because the chance itself is of value regardless of whether or not the card purchaser later suffers a 'loss.'" *Id.* It further held that any New York law that would invalidate the "gambling" with trading cards would not affect the lack of standing because "[t]he purchasers received a benefit regardless of the transactions' illegality or voidness." *Id.* at 52. For a discussion of the standing requirement for RICO, see *supra* notes 44-64 and accompanying text.

131. *See MLB Props.*, 105 F. Supp. 2d at 52 ("The situation might be different if the licensors and manufacturers caused some tangible financial loss by misrepresenting the odds or by some other swindle."). Still, "recoverability of the money spent means only that card purchasers have a claim under state law. . . . '[I]t does not follow that any injury for which a plaintiff might assert a state law claim is necessarily sufficient to establish a claim under RICO.'" *Id.* (quoting *Price II*, 138 F.3d at 607). Ultimately, in New York, "the statutory right to recover gambling losses is directed only toward the purpose of eliminating the lottery promoter's financial incentive. [It] does not . . . indicate that gambling transactions are inherently injurious. With its limited purpose and sphere, the statutory right shares no nexus with federal RICO." *Id.* at 53.

132. *See id.* at 53 (denying RICO claim).

133. *See, e.g., Dumas II*, 104 F. Supp. 2d 1220, 1220 (S.D. Cal. 2000). The district court ultimately heard eight cases, but it only published three of the opinions, each published sequentially and all virtually indistinguishable. *See id.*; *Rodriguez v. Topps Co.*, 104 F. Supp. 2d 1224, 1224 (S.D. Cal. 2000); *Schwartz v. Upper Deck Co.*, 104 F. Supp. 2d 1228, 1228 (S.D. Cal. 2000) [hereinafter *Schwartz III*]. For simplification within this Note, this "common opinion" will be referred to as the *Dumas II* opinion only.

134. *See Dumas II*, 104 F. Supp. 2d at 1221-22. Plaintiffs in *Dumas I* and *Schwartz II* alleged an alternative state law claim under California Business and Professional Code section 17200, which the *Dumas II* and *Schwartz III* courts dismissed for jurisdictional reasons. *See Schwartz III*, 104 F. Supp. 2d at 1228 (dismissing state

court denied the defendants' early dismissal motions.¹³⁵ In its definitive common opinion, however, the court dismissed each plaintiff's RICO claims for failure to establish adequate standing.¹³⁶

In the common opinion, the district court refuted the plaintiffs' claim that the consideration paid for the trading cards sufficiently doubled as an injury to their business or property.¹³⁷ Even though the court agreed that the plaintiffs might possess a valid common law gambling claim, their right to redress under that claim did not satisfy the RICO standing requirement.¹³⁸ Without some evidence of "fraud or dishonesty with respect to Defendants' gambling activity," the plaintiffs could not claim an injury.¹³⁹

IV. THE NINTH CIRCUIT'S "COMPREHENSIVE" OPINION

Much like its predecessors, the Ninth Circuit began its analysis by listing the elements a plaintiff must meet to bring a satisfactory RICO complaint.¹⁴⁰ Because the Southern District of California had dismissed all eight cases for the appellants' lack of RICO standing, the Ninth Circuit then concentrated on the two components

law claim with leave to amend); *Dumas II*, 104 F. Supp. 2d at 1221 (dismissing pendant state claims without prejudice); see also *Dumas I*, 52 F. Supp. 2d 1170, 1172 (S.D. Cal. 1999) (alleging claim under California Business and Professional Code section 17200); *Schwartz II*, 967 F. Supp. 405, 408 (S.D. Cal. 1997) (claiming violation of California Business and Professional Code section 17200). For a discussion of California Business and Professional Code section 17200, see *supra* notes 106-08 and accompanying text.

135. See *Dumas I*, 52 F. Supp. 2d at 1183 (rejecting defendant's motion to dismiss RICO claim); *Schwartz II*, 967 F. Supp. at 417 (denying defendant's motion to dismiss for failure to state RICO claim).

136. See *Dumas II*, 104 F. Supp. 2d at 1224 (dismissing plaintiffs' RICO claim pursuant to Rule 12(b)(6) of Federal Rules of Civil Procedure).

137. See *id.* at 1222-23. For a discussion of the RICO standing requirement, see *supra* notes 44-64 and accompanying text.

138. See *Dumas II*, 104 F. Supp. 2d at 1222-23 (stating plaintiffs' state law remedy "does not equate with the standing requirement of [18 U.S.C.] § 1964(c)"). The court refused to determine specifically whether the "illegal gambling" would fulfill the requisite requirements under 18 U.S.C. § 1962 because it found no standing. See *id.* For a discussion of the all the required elements of a civil RICO claim, see *supra* notes 41-82 and accompanying text.

139. *Dumas II*, 104 F. Supp. 2d at 1223. The court specifically suggested, "misrepresenting to purchasers the odds of winning a chase card" could be a form of fraud present in this type of case. *Id.* The court also pointed out, while state laws rely on public policy to punish a racketeering activity like illegal gambling, RICO follows a specific test requiring *actual injury* to sustain relief. See *id.*

140. See *Chaset v. Fleer/Skybox Int'l, LP*, 300 F.3d 1083, 1086 (9th Cir. 2002) (discussing RICO suit elements); see also *Price II*, 138 F.3d 602, 606 (5th Cir. 1998) (outlining RICO claim requirements); *MLB Props.*, 105 F. Supp. 2d 46, 49-51 (E.D.N.Y. 2000) (listing elements of RICO claim). For a complete discussion of each RICO element, see *supra* notes 41-82 and accompanying text. For a description of the facts of the *Chaset* case, see *supra* notes 24-34 and accompanying text.

related to standing.¹⁴¹ The court agreed that “a civil RICO plaintiff must show that his injury was proximately caused by the [prohibited] conduct . . . [and] that he has suffered a concrete financial loss.”¹⁴²

After establishing these principles, the court briefly reviewed the *Price* and *MLB Properties* cases because they shared nearly identical facts.¹⁴³ It first highlighted the Fifth Circuit’s assertion that “[i]njury to mere expectancy interests or to an ‘intangible property interest’ is not sufficient to confer RICO standing.”¹⁴⁴ It next reiterated the Eastern District of New York’s assessment that “[t]he chance [of receiving a ‘chase card’] is real, and having paid for it and received it, the card purchaser has not suffered any financial loss or RICO property injury.”¹⁴⁵

The Ninth Circuit also determined the plaintiffs could not establish standing and therefore could not sue under RICO.¹⁴⁶ Following those limited treatments by the other jurisdictions, the Ninth Circuit made the broad statement that it “agree[d] with those courts, with the district court, and with all other courts that have considered this issue.”¹⁴⁷ It noted the value of the plaintiffs’

141. See *Chaset*, 300 F.3d at 1086-87 (“[The standing] element includes two related components.”) (quoting *Fireman’s Fund Ins. Co. v. Stites*, 258 F.3d 1016, 1021 (9th Cir. 2001)). For a comprehensive review of the RICO standing element, see *supra* notes 44-64 and accompanying text.

142. *Chaset*, 300 F.3d at 1086-87 (quoting *Stites*, 258 F.3d at 1021). “To demonstrate injury for RICO purposes, plaintiffs must show proof of concrete financial loss, and not mere injury to a valuable intangible property interest.” *Id.* (citing *Oscar v. Univ. Students Co-Op. Ass’n*, 965 F.2d 783, 785 (9th Cir. 1992)). For an in-depth discussion of the standing element of RICO, see *supra* notes 44-64 and accompanying text.

143. See *Chaset*, 300 F.3d at 1087. Even though other jurisdictions have considered the implications of a RICO claim against trading card manufacturers, “[this] issue . . . is one of first impression in [the Ninth C]ircuit.” *Id.* For an explanation of the *Price II* decision, see *supra* notes 117-22 and accompanying text. For a summary of the *MLB Properties* opinion, see *supra* notes 123-32 and accompanying text.

144. *Chaset*, 300 F.3d at 1087 (quoting *Price II*, 138 F.3d at 607). “Plaintiffs do not allege that they received something different than precisely what they bargained for: six to twenty cards in a pack with a *chance* that one of those cards may be [a chase card].” *Id.* (quoting *Price II*, 138 F.3d at 607) (emphasis added). For a full analysis of the *Price II* opinion, see *supra* notes 117-22 and accompanying text.

145. *Chaset*, 300 F.3d at 1087 (quoting *MLB Props.*, 105 F. Supp. 2d at 51). For a complete discussion of the *MLB Properties* opinion, see *supra* notes 123-32 and accompanying text.

146. See *Chaset*, 300 F.3d at 1087. For a discussion of the standing element of a RICO complaint, see *supra* notes 44-64 and accompanying text.

147. *Chaset*, 300 F.3d at 1087. For a treatment of all relevant cases in which courts have deliberated RICO suits against trading card companies, see *supra* notes 117-39 and accompanying text.

deal should be determined at the time of purchase.¹⁴⁸ At that time, “they received value—eight or ten cards, one of which might be an insert card—for what they paid as a purchase price” and thus could not properly claim an injury.¹⁴⁹ Finally, the court flatly denied the plaintiffs’ plea to overturn the district court’s denial of a leave to amend their complaint to properly allege a valid injury.¹⁵⁰

The brevity of this last denial, of the treatment of other jurisdictions’ opinions, and of the overall reasoning hindered the Ninth Circuit’s opinion.¹⁵¹ The Ninth Circuit even neglected to analyze the lower court opinion’s content and merits.¹⁵² It noted the lower court’s “holding that there was no injury because plaintiffs ‘struck a bargain with Defendants and received the benefit of their bargain,’” but neglected to outline or examine it further.¹⁵³

Although the Ninth Circuit may have limited its opinion intentionally to discredit forum-shopping plaintiffs, its shortness may have actually hindered the effort to prevent similar future actions.¹⁵⁴ These plaintiffs may have actively sought a cooperative and sympathetic jurisdiction.¹⁵⁵ In refusing to entertain jurisdiction, the court offered a meager discussion of the case and left the door open for future litigation.¹⁵⁶

148. See *Chaset*, 300 F.3d at 1087 (explaining purchase is appropriate time at which to determine value of cards).

149. *Id.* (“Their disappointment upon not finding an insert card in the package is not an injury to property.”).

150. See *id.* at 1087-88. The court said: “We conclude that the plaintiffs cannot cure the basic flaw in their pleading. Because any amendment would be *futile*, there is no need to prolong the litigation by permitting further amendment.” *Id.* at 1088 (emphasis added). For an analysis of what a plaintiff would need to properly allege a RICO complaint, see *supra* notes 41-82 and accompanying text.

151. See *Chaset*, 300 F.3d at 1083-88. The opinion is only five pages long, and the entire analysis begins on the third page. See *id.* The Ninth Circuit devoted only one paragraph apiece to the Fifth Circuit’s opinion, the Eastern District of New York’s opinion, and the amendment consideration. See *id.* at 1087-88.

152. See *id.* at 1085-88. The only mention the Ninth Circuit made of the California district court common opinion was, “[w]e agree with . . . the district court.” *Id.* at 1087.

153. *Id.* at 1086 (quoting *Dumas II*, 104 F. Supp. 2d 1220, 1223 (S.D. Cal. 2000)).

154. The Eastern District of New York first highlighted an attempt to forum shop: “For the last three years, the card purchasers, represented chiefly by the attorneys in this case, have shopped around to find a forum ‘friendly’ to their claims in order to induce a financial settlement.” *MLB Props.*, 105 F. Supp. 2d 46, 48 (E.D.N.Y. 2000).

155. See *Chaset*, 300 F.3d at 1083 (indicating continued effort of same *MLB Properties* plaintiffs in new jurisdiction); see also *MLB Props.*, 105 F. Supp. 2d at 48 (discussing forum shopping).

156. See *Chaset*, 300 F.3d at 1087 (indicating court did little more than say it “agree[d] with” other jurisdictions and lower court). For a discussion of the Ninth

Specifically, the court seemed to treat the issue in this case as though no factual, procedural, or analytical change in the future, by these or similarly situated plaintiffs, could change its holding, which may not be true.¹⁵⁷ For example, the court never discussed whether California gambling laws could possibly supplement a RICO action.¹⁵⁸ The lower court specifically noted the California laws did not help the plaintiffs show a RICO injury, but the Ninth Circuit neglected to explain those laws or their possible implication upon the plaintiffs' RICO claims.¹⁵⁹ The relevant portion of the California Business and Professional Code to which the plaintiffs appealed requires proof of fraudulent activity by a defendant.¹⁶⁰ If proved, the fraudulent activity may be enough for a plaintiff to establish a RICO injury.¹⁶¹

The Ninth Circuit did not discuss the merits of fraud allegations as a possible RICO injury and expressly denied the plaintiffs' alternative plea to amend their complaint.¹⁶² Even if the court denied the plaintiffs' right to amend because it found no merit in the fraud claim as a possible RICO injury, it could have expanded its

Circuit's reasoning in its brief opinion, see *supra* notes 140-50 and accompanying text.

157. See *Chaset*, 300 F.3d at 1085-88 (insisting any amendment to complaint would be useless).

158. See *id.* at 1083-88 (showing lack of discussion of California state law). The Eastern District of New York undertook such considerations in its opinion. See *MLB Props.*, 105 F. Supp. 2d at 51-53 (discussing relevant state laws). For a review of the relevant California gambling statutes, see *supra* notes 90-108 and accompanying text.

159. See *Chaset*, 300 F.3d at 1085-88 (failing to mention California laws). But see *Dumas II*, 104 F. Supp. 2d 1220, 1222-23 (S.D. Cal. 2000) (discussing California laws' inability to support civil RICO injury requirement). The original opinions in the Southern District of California indicate the plaintiffs sought relief under the California Business and Professional Code § 17200. See *Dumas I*, 52 F. Supp. 2d 1170, 1173 (S.D. Cal. 1999); *Schwartz II*, 967 F. Supp. 405, 408 (S.D. Cal. 1997); see also CAL. BUS. & PROF. CODE §§ 17200, 17202, 17203, 17206 (West 1997). For a discussion of the California gambling laws, see *supra* notes 90-105 and accompanying text. For a discussion of the civil RICO injury requirement, see *supra* notes 44-64 and accompanying text.

160. See *Dumas I*, 52 F. Supp. 2d at 1172 (noting plaintiffs' use of California Business and Professional Code). "[U]nfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." CAL. BUS. & PROF. CODE § 17200 (West 1997). For a more detailed treatment of this statute, see *supra* notes 106-08 and accompanying text.

161. See *Dumas II*, 104 F. Supp. 2d at 1223 (describing fraud or misconduct as sufficient to constitute RICO injury); see also *Sedima II*, 473 U.S. 479, 481-82 (1985) (recognizing fraudulent activity as RICO injury). For a more in-depth treatment of *Dumas II*, see *supra* notes 133-39 and accompanying text. For a discussion of what constitutes an injury under RICO, see *supra* notes 44-64 and accompanying text.

162. See *Chaset*, 300 F.3d at 1086-88 (lacking discussion of fraud and denying plaintiffs' motion to amend complaint).

discussion.¹⁶³ The court merely said it agreed with the district court; if viewed broadly, this would mean the Ninth Circuit agreed with *everything* the district court said.¹⁶⁴ If that were true, the Ninth Circuit would agree that alleged fraud possibly could satisfy the RICO injury requirement, but its refusal to allow a “futile” amendment of the complaint does not square with that view.¹⁶⁵ Additionally, one of the unpublished cases on appeal specifically alleged fraud, but the Ninth Circuit did not even discuss it.¹⁶⁶ The court could have addressed this issue of fraud classifying a RICO injury and ultimately expand or contract the breadth of RICO protections, but it did not.¹⁶⁷

The Ninth Circuit also neglected to discuss whether California gambling laws could satisfy a racketeering activity under RICO.¹⁶⁸ Granted, if the court would have discussed the four RICO elements beyond standing, it would have been dicta because its analysis could end properly with a finding of lack of standing.¹⁶⁹ Nonetheless, if the court were to have allowed the plaintiffs to amend the complaint to allege fraud and were to find the fraud sufficient for the RICO injury requirement, it would have had to discuss the remain-

163. See *id.* (neglecting to mention possibility of fraud claim as RICO injury).

164. See *id.* at 1087. For a summary of the district court opinion, see *supra* notes 133-39 and accompanying text.

165. See *Chaset*, 300 F.3d at 1088 (refusing to allow amendment to complaint); see also *Dumas II*, 104 F. Supp. 2d at 1223 (noting possibility of fraud satisfying civil RICO injury). For a discussion of the civil RICO injury requirement, see *supra* notes 44-64 and accompanying text.

166. See *Chaset*, 300 F.3d at 1085-88. The plaintiffs in the prior unpublished case specifically alleged:

[T]he wrapping for the *Pokemon* trading card packages states only in general terms that the odds of obtaining a premium card are approximately one in 33. Plaintiffs contend that in reality, the odds of obtaining each of the 150 different *Pokemon* cards, including the premium cards, vary greatly. They claim, as an example, that the chances of getting a [certain rare card] in a package is believed to be one in 66, while the chances of getting a [different rare card] is believed to be one in 33.

Consumers, *supra* note 5, at 10.

167. See *Chaset*, 300 F.3d at 1086-88 (failing to clarify whether fraud or misconduct constituted RICO injury).

168. See *id.* For a discussion of what constitutes a racketeering activity under RICO, see *supra* notes 79-82 and accompanying text. For a discussion of the California gambling laws, see *supra* notes 90-105 and accompanying text.

169. See *Price II*, 138 F.3d 602, 606 (5th Cir. 1998) (“[Before four RICO elements are considered,] a plaintiff must establish that he [or she] has standing to sue.”); *Dumas II*, 104 F. Supp. 2d at 1223 (“Having determined that Plaintiffs lack standing under [18 U.S.C.] § 1964(c), the Court need not, and therefore does not, analyze further elements by [18 U.S.C.] § 1962.”). For a discussion of the elements necessary to establish a civil RICO claim, see *supra* notes 41-82 and accompanying text.

ing four elements.¹⁷⁰ Still, the court could have discussed the four other RICO elements in the context of the particular facts of this case, even if in dicta, to attempt to clarify how the California gambling laws relate.¹⁷¹

Similarly, the Ninth Circuit could have considered the merits of a possible plaintiff's state law claim.¹⁷² This could have helped the court encourage future plaintiffs to seek relief elsewhere.¹⁷³ If the court were to discuss the possibilities of relief available under state law, it could protect itself from future similar cases because plaintiffs may realize they have a better chance in state court.¹⁷⁴

Ultimately, the Ninth Circuit could have better served itself and the judicial system by following a comprehensive, analytic pattern similar to that used by the Fifth Circuit and Eastern District of New York.¹⁷⁵ After discussing the RICO requirements and limitations, the court could have described more fully the individual parties' contentions.¹⁷⁶ It also could have undertaken more analysis of the relevant legal precedent.¹⁷⁷ Finally, it could have discussed the

170. See *Chaset*, 300 F.3d at 1086-88 (refusing to allow plaintiffs to amend complaint). For an outline of how a plaintiff establishes a civil RICO action, see *supra* notes 41-82 and accompanying text.

171. See *Dumas I*, 52 F. Supp. 2d 1170, 1183 (S.D. Cal. 1999) (admitting California gambling laws may establish racketeering activity for RICO purposes). "[T]he use of 'chase' cards may violate [California Penal Code] § 319." *Id.* For a discussion of California Penal Code section 319 and other lottery laws, see *supra* notes 90-105 and accompanying text.

172. See, e.g., *Dumas II*, 104 F. Supp. 2d at 1223 (discussing state law claims); *Dumas I*, 52 F. Supp. 2d at 1172-73, 1182-83 (discussing plaintiffs' appeals to California Penal Code and California Business and Professional Code). For a discussion of the California gambling laws, see *supra* notes 90-105 and accompanying text.

173. See *Dumas II*, 104 F. Supp. 2d at 1223-24 (dismissing state law claims); see also *Chaset*, 300 F.3d at 1083-88 (failing to mention appeal of dismissal).

174. See *Price II*, 138 F.3d at 606-07 (discussing state law claims); *MLB Props.*, 105 F. Supp. 2d 46, 50-53 (E.D.N.Y. 2000) (mentioning claims available under state law).

175. See *Price II*, 138 F.3d at 605-08 (outlining courts reasoning); *MLB Props.*, 105 F. Supp. 2d at 48-53 (showing court's discussion). For an outline of the Fifth Circuit's analysis in *Price II*, see *supra* notes 117-22 and accompanying text. For a summary of the Eastern District of New York's opinion in *MLB Properties*, see *supra* notes 123-32 and accompanying text.

176. See *Chaset*, 300 F.3d at 1085-88 (failing to give comprehensive description of parties' arguments). But see *Price II*, 138 F.3d at 606-07 (outlining parties' assertions); *MLB Props.*, 105 F. Supp. 2d at 49-52 (describing reasoning of parties).

177. See *Chaset*, 300 F.3d at 1087 (dedicating only one paragraph each to *Price II* and *MLB Properties*, and showing no treatment of lower court opinion). But see *Price II*, 138 F.3d at 607-08 (discussing available precedent, even though this was essentially first decision of its kind); *MLB Props.*, 105 F. Supp. 2d at 48-52 (analyzing prior decisions). For a discussion of the relevant court precedents, see *supra* notes 117-32 and accompanying text.

relevant state laws underlying the plaintiffs' RICO claims.¹⁷⁸ By amplifying its opinion to discuss the issues comprehensively, the Ninth Circuit could have avoided similar RICO claims, which it may face in the future.

V. SUING TRADING CARD COMPANIES MAY BE A GAMBLE

An excited child's repeated purchase and swapping of trading cards may not provide an ideal basis for a RICO claim.¹⁷⁹ Despite this reality, plaintiffs' attempts to seek treble damages from trading card companies for alleged RICO violations may not cease soon.¹⁸⁰ The Ninth Circuit's brief and amorphous opinion may have left the door open for future litigation.¹⁸¹ The Supreme Court is unlikely to hear this issue soon because the Ninth Circuit did not create a circuit split, yet the *Chaset* result probably will not deter future litigants from again attempting similar claims in the lower courts.¹⁸² The unanswered questions in *Chaset* may encourage litigants to continue to seek relief using different tactics.¹⁸³

Even if more plaintiffs attempt to seek relief under RICO, they will likely not succeed.¹⁸⁴ Congress created RICO to combat organized crime, and incidentally offered a civil remedy for victims of the *organized illicit behavior*.¹⁸⁵ Realistically, trading card companies, the

178. See *Chaset*, 300 F.3d at 1085-88 (failing to mention California state laws). But see *Price II*, 138 F.3d at 606-07 (analyzing implications of state laws upon RICO action); *MLB Props.*, 105 F. Supp. 2d at 50-53 (discussing state laws thoroughly). For a list of the relevant California statutes, see *supra* notes 90-105 and accompanying text.

179. See Halperin, *supra* note 1 (describing hypothetical child gambling phenomenon).

180. For examples of RICO suits against trading card companies, as in *Chaset*, *Price II*, and *MLB Properties*, see *supra* notes 24-34, 117-50 and accompanying text.

181. See *Chaset*, 300 F.3d at 1083-88. For a discussion of how the opinion is amorphous and of the possible effects of its brevity, see *supra* notes 151-78 and accompanying text.

182. See *Chaset*, 300 F.3d at 1087 (agreeing with *Price II* and *MLB Properties*).

183. See *id.* at 1085-88 (showing no analysis of state law or district court's treatment). For a discussion of this deficiency and others, see *supra* notes 151-78 and accompanying text.

184. See *Chaset*, 300 F.3d at 1088 (dismissing plaintiffs' case); *Price II*, 138 F.3d 602, 608 (5th Cir. 1998) (finding for defendants); *MLB Props.*, 105 F. Supp. 2d 46, 53 (E.D.N.Y. 2000) (denying recovery to plaintiffs). These cases indicate that no plaintiff to date has succeeded in a suit against a trading card company under RICO.

185. See 18 U.S.C. §§ 1961-1968 (2000) (outlining RICO). For a history of the RICO statute, see *supra* notes 35-38 and accompanying text.

facilitators of a national pastime, are not engaging in fraudulent activity, nor are they architects of a national epidemic.¹⁸⁶

Even though the trading card companies' marketing practices may have caused an influx in card sales, they are not necessarily villains.¹⁸⁷ The companies are doing nothing more than successfully creating a fad.¹⁸⁸ They have little to do with the secondary market created by the card traders and merely utilize the artificial demand and brilliant marketing to conduct a profitable, legal business.¹⁸⁹

Much like the popularity of the trading cards themselves, the trend of suing manufacturers should eventually wane. Expensive civil RICO settlements have been the clear motivating factor for these plaintiffs because courts have all but said plaintiffs may have valid state court remedies and plaintiffs have yet to pursue those options seriously.¹⁹⁰ Even if the plaintiffs were to pursue state law claims, they may have a difficult case.¹⁹¹

If card manufacturers were actually to be held liable, some critics wonder where the line of culpability would be drawn.¹⁹² Per-

186. See *MLB Props.*, 105 F. Supp. 2d at 53 (indicating Eastern District of New York did not feel actions of trading card companies created serious problems because card purchasers "have not been the victims of a nationwide scourge requiring a nationwide remedy").

187. See *Consumers*, *supra* note 5, at 10. Some allege that the *Pokémon* trading card manufacturers, "to encourage kids to buy multiple packages of *Pokemon* cards[,] . . . have created a card game where . . . the more powerful chase cards increase the players' chance of winning. This necessitates the purchase of multiple packages of cards in order to increase the possibility of obtaining the more premium cards." *Id.* Still, "[s]ome parents think the game encourages reading, critical thinking and social interaction. . . . '*Pokemon* is a great learning tool. . . . It is teaching [kids] what things cost and how to save money. It also teaches [them] how to negotiate and to get along with other kids.'" *Hooked*, *supra* note 8.

188. See *Hooked*, *supra* note 8 ("Undoubtedly, [*Pokémon* card trading] is a fad and will be replaced in a short time . . .").

189. See *Kent*, *supra* note 4 ("In Nintendo's eyes, [the] rare foil-backed trading card is worth no more money than the [standard] cards that are so common that some kids throw them away."). For a discussion of the secondary market, see *supra* notes 4-6 and accompanying text.

190. See *Price II*, 138 F.3d 602, 607 (5th Cir. 1998) (noting possibility of state law action).

191. See *id.* (discussing only *possibility* of state law claim); *MLB Props.*, 105 F. Supp. 2d at 51 (refuting possible success of state law claim).

192. See *Kent*, *supra* note 4 (noting irrationality of lawsuit). Kent commented:

If Nintendo is culpable for gambling by offering a rare card in every one-of-eleven packages, how about those gum machines that have one capsule with a watch or a nice pocket knife and about 100 capsules with rubber spiders? Is that illegal gambling, too?

How about McDonalds'[s] annual *Monopoly* game promotion? In that promotion you receive little cards on large drinks and fries that can add up to millions of dollars worth of prizes.

haps the Ninth Circuit purposely gave little treatment to this issue because it recognized the absurdity of using RICO under such circumstances.¹⁹³ Perhaps the latest failure in the RICO crusade could show parents that monitoring their children may be the best way to curb their “gambling” habits.¹⁹⁴ Instead of going forward with federal suits, parents and card traders should take a step back to evaluate and adjust their conduct.¹⁹⁵

Christopher D. Mudd

Id.

193. See *Chaset v. Fleer/Skybox Int'l, LP*, 300 F.3d 1083, 1083-88 (9th Cir. 2002). The court simply may have agreed with the other jurisdictions that considered the issue and refused to give the plaintiffs any more credit or treatment than it believed they deserved.

194. See *Pokemon Racketeers*, ARIZ. DAILY WILDCAT, Oct. 14, 1999, available at http://wildcat.arizona.edu/papers/93/38/04_3_m.html. “Parents are setting a bad example by suing the [trading card] compan[ies]. . . . Did it ever occur to the parents to talk about the issue with their children? Did it occur to them to say, ‘No, Timmy, you can’t buy those cards?’” *Id.*

195. See *Our View*, *supra* note 14, at 4A. The article posits: When fads become obsessions, either for children or adults, we should [not] blame the companies who marketed the concept. Instead, we should examine the flaws in our society that introduce chinks in the armor of effective parenting and produce adults who think like children and thus are unable to be adults to their own offspring.

Id.

